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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

TONY JOSE CARAPIA,

Defendant and Appellant.

D042110

(Super. Ct. No. SCN130718)

APPEAL from a judgment of the Superior Court of San Diego County, Carol C. Lam, Judge. Affirmed in part, reversed in part, remanded with instructions.

Tony Jose Carapia appeals a judgment entered after a jury convicted him of attempted murder (Pen. Code, §§ 664, 187, subd. (a))<sup>1</sup> (count 1) and assault with a deadly weapon or force likely to cause great bodily injury (§ 245, subd. (a)(1)) (count 2). The jury found true with respect to each offense allegations that Carapia used a deadly or dangerous weapon (§ 12022, subd. (b)(1)), personally inflicted great bodily injury (§ 12022.7, subd. (a)), and committed the offenses for the benefit of a criminal street

gang (§ 186.22, subd. (b)(1)). As to the assault (count 2), the jury also found he personally used a knife (§ 1192.7, subd. (c)(23)). The court found true the prior prison term allegation (§ 667.5, subd. (b)).

Carapia appeals, contending (1) there is insufficient evidence to support the true finding the crimes were committed for the benefit of a criminal street gang, and (2) the trial court prejudicially erred by denying Carapia's motion to bifurcate trial on the gang allegations from the trial on the underlying offenses. We requested supplemental briefing on the issue of whether Carapia was entitled to have a jury determine the truth of the aggravating factors relied on by the trial court in imposing the upper term sentence on count 1 under *Blakely v. Washington* (2004) \_\_ U.S. \_\_ [124 S.Ct. 2531] (hereafter *Blakely*). We find *Blakely* error and remand for resentencing. In all other respects, we affirm the judgment.

#### FACTUAL AND PROCEDURAL BACKGROUND

Carapia was a member of the Westside street gang. The Westside gang asserted control over a house rented by Richard Goodman.<sup>2</sup> The gang members marked the house with their gang sign and thus indicated Westside had "established dominance over that house" and that they conducted business there. The Westside gang sold drugs from the house. The prosecution's expert testified this was a typical method of operation for the Westside gang: "[t]o move into a house, take over the house, claim everything in the

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise specified.

<sup>2</sup> Goodman was not a member of a gang.

house to belong to them," to "intimidate people that come to the house, primarily for the purposes of distributing methamphetamine," and to use the house as a "crash pad" or "party house where they can gather outside of police presence and do drugs."

During the months prior to the stabbing, the leadership at this house changed several times as the leaders were arrested. Initially, "Plucas" had been the leader. Goodman had invited Plucas to the house. When Plucas was arrested, "Monster" became the leader. At this point, Goodman did not mind that Westside gang members used the house. Monster was followed by "Lazy Boy." When Lazy Boy became the leader, things changed because he and his girlfriend began staying in the house 24 hours a day and living in the living room. On a couple of occasions, Goodman asked Lazy Boy and his girlfriend to leave. They would leave briefly, but then return. This went on for about a month. After Lazy Boy was arrested, there was a transitional period. Eventually, about three weeks before the stabbing, Carapia became the leader. Within "[t]he first week or so," Carapia told Goodman, "If there are any drugs that are going to be sold here. I am going to be in charge of that."

Within a week of the stabbing, Carapia asked to borrow a cell phone from Goodman. The cell phone did not belong to Goodman but to Stephen Thomas and his wife, Adrian.<sup>3</sup> Stephen discovered Carapia was using the phone. During a telephone conversation, Stephen told Carapia there was "a problem," "cussed" at Carapia, and complained that he did not know Carapia and the bill was coming to him. Stephen

arranged to pick up the phone at Goodman's house.

Stephen had been to Goodman's house in the past. Several times Goodman told Stephen he "would be in danger if [he] went to [Goodman's] house and took on the people there." Stephen brought with him a cane and a table leg that could be used as weapons. Stephen, however, did not have any reason to believe there would be a confrontation.

Carapia arranged for his cousin to drive him to the Goodman house, gave the phone to Goodman at the house, and then waited for Stephen to arrive.

When Stephen and Adrian arrived, there were several Hispanic men, including Carapia, in the small living room of the house as well as Goodman who was in the bedroom. The men in the living room were "very quiet" and the atmosphere was "menacing." Goodman gave the phone to Stephen and then said, "I hope you came prepared." Stephen responded, "I am always prepared," meaning that he could defend himself. Stephen turned to leave.

When he entered the living room, Carapia stated, "You said we have a problem." Stephen responded, "Yes, I did, but the problem is solved because I have my property." Carapia repeated his statement and advanced toward Stephen. Stephen told him that he "didn't come to start trouble." He told Carapia the phone belonged to his wife who had lent it to Goodman and stated only Goodman was entitled to use the phone. Carapia felt Stephen was taunting him, being "[i]n a way" disrespectful and was trying to "make a

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<sup>3</sup> For the sake of convenience, we refer to Stephen and Adrian Thomas by their first

fool" of Carapia. Carapia angrily responded, "Your property is my property, now, what's up, Homes." The two men stared at each other while standing six to seven feet apart. Carapia continued to advance towards Stephen. Stephen dropped a flashlight he was holding because he thought they were going to fight. When Stephen dropped the flashlight, Carapia and Stephen advanced toward each other. Carapia was "too close for [Stephen] to hit." During the fight, Carapia stabbed Stephen multiple times including twice in his chest. Everyone else in the house fled during the fight.

After the stabbing, Carapia and two of the other men from the living room went to where Carapia's cousin was waiting in his car. Carapia said to his cousin, "Where the hell were you? I thought you were backing me up. Let's get out of here." Later, Carapia threatened to harm Goodman, Stephen, and Stephen's wife if they cooperated with the police.

A prosecution expert testified gangs use violence and intimidation to protect their territory, explaining: "It is very important to a gang to be perceived on the streets as a strong, tough gang, because there is less likelihood of a challenge from rival gangs if they are perceived on the street as being tough." Violent acts by a gang member enhance a gang's reputation and benefit the gang by discouraging other gangs from making challenges as well as aid in the recruitment of new members. Violent acts "eliminate[] the competition" by discouraging other people, for example, from establishing a drug

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names.

trade in the neighborhood; anyone who would want to establish a drug trade in a Westside gang neighborhood would have to first deal with the Westside gang.

The prosecution expert also explained: "Respect factors into every gang. There can be no communication without respect. . . . That is what gang members live for and . . . everything derives from respect." The expert explained, "The more violent the gang member is, the higher on the ladder he is looked upon by the younger members. He is admired more by the younger gang members, which helps in their membership recruitments. It also establishes that person as somebody willing to take care of business on behalf of the gang, somebody not afraid of paying the price for it. So respect is a very, very important thing in the gang mentality."

Carapia denied being a gang member or stabbing Stephen. He claimed Stephen was the aggressor.

The jury found Carapia guilty of attempted murder and assault with a deadly weapon or force likely to produce great bodily injury and found all of the enhancement allegations true. The court sentenced Carapia to 24 years in prison, consisting of the upper term of nine years for the attempted murder conviction, adding a consecutive term of three years for the great bodily injury enhancement, a consecutive term of one year for the deadly weapon enhancement, a consecutive term of 10 years for the criminal street gang enhancement, and a consecutive term of one year for the prior prison term enhancement. The court stayed imposition of the sentence on count 2 (assault) and appended enhancements under section 654.

## DISCUSSION

### I

#### *Evidence to Support the Gang Enhancement*

Carapia contends the evidence is insufficient to support the criminal street gang enhancement because there was no showing the crime was committed for the benefit of a criminal street gang with the specific intent to promote gang-related conduct.

In assessing the sufficiency of the evidence on appeal, this court reviews the entire record most favorably to the judgment to determine whether it contains evidence that is "reasonable, credible and of solid value." (*People v. Johnson* (1980) 26 Cal.3d 557, 578; *People v. Hillery* (1965) 62 Cal.2d 692, 702.) The critical question is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *People v. Johnson*, at p. 576.) We reverse a conviction on the ground of insufficient evidence only if it clearly appears that "upon no hypothesis whatever is there sufficient substantial evidence to support it." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

To establish a criminal street gang enhancement, the prosecution must prove the underlying crimes were "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the *specific intent* to promote, further, or assist in any criminal conduct by gang members. . . ." (§ 186.22, subd. (b)(1), italics added.) A finding of specific intent requires a subjective desire to benefit the gang in committing the offense. (See 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000)

Elements, § 5, p. 204; see also *State v. Varszegi* (1993) 33 Conn.App. 368, 372 [635 A.2d 816, 818].) It is not enough that the crime is based on personal reasons; it must be "gang related." (*People v. Gardeley* (1996) 14 Cal.4th 605, 622.) The gang enhancement elements may be established through expert testimony. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 322.)

Here, while the jury could have concluded the stabbing was simply the result of a dispute over a cell phone unrelated to any gang activity, it was not required to do so. Based on the evidence presented, it could reasonably conclude this violent confrontation was gang-related and was committed with the specific intent to enhance the reputation of Carapia and the Westside gang and the gang's control over this house where drugs are sold.

The actual transfer of the cell phone occurred without incident; Carapia, as agreed, returned the phone to Goodman who, in turn, gave it to Stephen. Only after the phone had been transferred, did Carapia confront Stephen about the "problem." Carapia was offended when Stephen stated only Goodman could use the phone. Carapia felt this statement was disrespectful, taunting, and made him appear to be a fool in front of the others. It was at this point that Carapia claimed that everything in the house belonged to him and advanced toward Stephen in a menacing manner.

Expert testimony indicated that "respect is a very, very important thing in the gang mentality," that gang members gain respect by being violent, and that, further, violent acts benefit a gang by discouraging other gangs from making challenges and in recruiting new gang members.



Based on this evidence, a reasonable jury could conclude Carapia's very violent conduct had little to do with the cell phone and a great deal to do with his desire to maintain his reputation within the gang and to enhance the gang's reputation. A jury could reasonably conclude the stabbing was committed with the specific intent of benefiting the Westside gang by enhancing its reputation as a violent gang that would not tolerate disrespectful conduct of any sort. The jury was entitled to reject Carapia's version he was not a gang member and that the stabbing had nothing to do with the Westside gang.

## II

### *The Motion To Bifurcate*

Carapia contends the trial court's denial of his motion to bifurcate trial of the criminal street gang allegation from the substantive trial was an abuse of discretion. He argues the trial court committed prejudicial error by admitting evidence of his gang affiliation in the trial of the underlying crimes because it had little probative value and its admission affected the jury's verdict, requiring reversal of the convictions.

The trial court has broad discretion in deciding whether to bifurcate issues in a criminal trial. (§ 1044; *People v. Cox* (1991) 53 Cal.3d 618, 700.) The court's determination will be reversed only if it abuses its discretion. (*People v. Calderon* (1994) 9 Cal.4th 69, 79.) Discretion is abused when, after considering all of the circumstances, no judge could have reasonably reached the challenged result. (*Smith v. Smith* (1969) 1 Cal.App.3d 952, 958.)

Gang affiliation evidence may be prejudicial to a defendant; however, it may be admissible if relevant to prove the defendant's identity, motive or intent. (*People v. Williams* (1997) 16 Cal.4th 153, 193; *People v. Martin* (1994) 23 Cal.App.4th 76, 81.) Gang evidence may also be admissible if it is inextricably intertwined with evidence of the substantive offense. (*Martin, supra*, at p. 81.) Because gang evidence is highly inflammatory to a jury, the trial judge should carefully scrutinize the evidence before admitting it. (*Williams, supra*, at p. 193.) Given this inflammatory impact, the introduction of evidence of gang membership is inappropriate if it is only tangentially relevant. (*People v. Cox, supra*, 53 Cal.3d at p. 660.)

Here, the defense sought bifurcation of the criminal street gang enhancement, arguing the case was merely about a dispute over a cell phone, it was "a relatively weak case as to just what happened," the case would become "strong if [the jury] decided [Carapia] is a bad person," and that admission of gang evidence would be unduly prejudicial. The prosecutor opposed the motion, arguing the case was not "just a simple dispute over a cell phone" but was a violent act committed to protect Carapia's gang "turf and protect his reputation. The cell phone dispute turned violent because Carapia needed to prove his status in the gang and that he had "control over everything in that house."

The court noted the evidence presented at the preliminary hearing indicated the house had been taken over by the Westside gang, Carapia became the leader, "declared basically the goings-on in the house to be his activities from that point on," and that the stabbing occurred in front of three or four other men, at least some of whom were known Westside gang members. Under these circumstances, the trial court found the evidence

in support of the gang allegations was more probative than prejudicial and denied the motion to vacate.

We find no abuse of discretion. The evidence was relevant to explain why the stabbing occurred, that is, that the stabbing was motivated by Carapia's desire to maintain his position of leadership in the gang, defend his gang territory, and to enhance his own and the gang's reputation through committing a violent act. Carapia's gang affiliation and gang status were inextricably interwoven in the stabbing incident.

### III

#### *Imposition of the Upper Term Sentence -- Blakely*

Carapia contends imposition of the upper term of nine years on count 1 without a jury determination on the aggravating factors is a violation of his Sixth Amendment right to trial by jury, requiring reversal of the sentence under *Blakely*.

The recent decision of the United States Supreme Court in *Blakely, supra*, 124 S.Ct. 2531 considered the constitutionality of a sentence imposed by a Washington court beyond the prescribed statutory maximum. *Blakely* held relying on factors not admitted by the defendant or proved to a jury beyond a reasonable doubt in imposing a sentence beyond the statutory maximum violates that defendant's Sixth Amendment right to trial by jury. In *Blakely*, the defendant pleaded guilty to kidnapping with a firearm. The sentencing statute permitted increased sentences if a judge found "substantial and compelling" reasons justifying a greater penalty. (*Blakely, supra*, at p. 2535.) The court

sentenced him to an exceptional sentence of 90 months<sup>4</sup> after finding he acted with "deliberate cruelty" in committing the crime. The Court of Appeals affirmed.<sup>5</sup>

In reversing the Court of Appeals, the United States Supreme Court relied on *Apprendi v. New Jersey* (2000) 530 U.S. 466. *Apprendi* held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at p. 490.) In *Blakely* the facts justifying the increased penalty were not admitted by *Blakely* or found true beyond a reasonable doubt by a jury. The Supreme Court stated:

"Our precedents make clear . . . that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of facts reflected in the jury verdict or admitted by the defendant*. [Citations.] In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [citation], and the judge exceeds his proper authority." (*Blakely, supra*, at p. 2537, original italics.)

In California, under the determinate sentencing law, conviction requires imposition of the middle term of three possible sentencing terms. Section 1170, subdivision (b) provides in part: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, *the court shall order imposition of the middle*

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<sup>4</sup> Washington's Sentencing Reform Act limited the range of sentencing for kidnapping with a firearm to a "standard range" of 49 to 53 months. (See *Blakely, supra*, 124 S.Ct. at p. 2535.)

<sup>5</sup> *State v. Blakely* (2002) 111 Wash.App. 851, 870-871.

*term*, unless there are circumstances in aggravation or mitigation of the crime." (Italics added.) Therefore, based solely on the jury's verdict, the "statutory maximum" for *Apprendi* purposes is the middle term. Similar to Washington's statute, California's sentencing statute permits imposition of a sentence greater than the statutory maximum where there are aggravating factors. California Rules of Court, rule 4.420(b) provides in part: "Circumstances in aggravation and mitigation shall be established [by a judge] by a preponderance of the evidence. Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation."

These provisions bring California's sentencing system within *Blakely's* holding which applies even though the trial court sentenced Carapia before the Supreme Court issued its decision. When a Supreme Court decision results in a new rule, it applies to all criminal cases pending on direct review. (*Schriro v. Summerlin* (2004) \_\_ U.S. \_\_ [124 S.Ct. 2519]; *Griffith v. Kentucky* (1987) 479 U.S. 314, 328.) Thus, *Blakely* applies because this case was on appeal and not yet final when the Supreme Court issued its opinion. Furthermore, appeal of this issue is not waived because a defendant is not precluded from raising a claim asserting deprivation of fundamental constitutional rights for the first time on appeal. (*People v. Vera* (1997) 15 Cal.4th 269, 276.) The right to a jury trial is a fundamental constitutional right. (*Ibid.*) In addition, an objection in the trial court would have been futile because statutory law required the judge to determine circumstances in aggravation in implementing the upper term. (See *People v. Turner* (1990) 50 Cal.3d 668, 703.)

Here, a jury convicted Carapia of attempted murder. (§§ 664, 187, subd. (a).) This conviction supported a maximum sentence of seven years under section 664, subdivision (a).<sup>6</sup> The trial court considered the aggravating and mitigating factors. Using the preponderance of the evidence standard, the court found the circumstances in aggravation outweighed the circumstances in mitigation<sup>7</sup> and imposed the upper term of nine years under sections 664 and 187, subdivision (a). This sentence resulted in a sentence two years greater than that authorized by state law for the offense established by the jury's verdict. Under *Blakely*, this sentencing procedure does not comply with the Sixth Amendment. "[E]very defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." (*Blakely, supra*, 124 S.Ct. at p. 2543, citing *Apprendi, supra*, 530 U.S. at p. 466.) Facts considered in Carapia's punishment involve those beyond what the jury determined. Thus, to be in accordance with the Sixth Amendment, factors other than prior convictions or other matters not subject to factual dispute used to increase Carapia's statutorily authorized sentence should be based on facts admitted or proved beyond a reasonable doubt to a jury. We conclude the aggravated sentence imposed in this case is a violation of the constitutional mandate of *Blakely, supra*, 124 S.Ct. 2531.

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<sup>6</sup> The possible sentences for this offense are five, seven and nine years.

<sup>7</sup> The probation report discussed circumstances in aggravation and mitigation. Circumstances in aggravation included: violent acts as a juvenile and toward police, threatening witnesses or dissuading them from testifying, an increasingly serious prior criminal record, parole violations, and short length of time out of custody before committing this crime. The probation report listed no circumstances in mitigation.

In cases involving fundamental structural defects, including denial of the right to a jury and depriving a defendant of the requirement of proof beyond a reasonable doubt, the applicable standard is reversible error per se. (*Arizona v. Fulminante* (1991) 499 U.S. 279; *People v. Breverman* (1998) 19 Cal.4th 142, 174; *Sullivan v. Louisiana* (1993) 508 U.S. 275.) The error in this case can be characterized as the denial of Carapia's fundamental right to a jury determination of factors relevant to his punishment. Here, the judge concluded the circumstances in aggravation were true by a preponderance of the evidence. Thus, the facts justifying an aggravated sentence were determined by the wrong entity under a standard of proof less than that required under *Apprendi*. Carapia was denied a jury trial on circumstances relevant to his sentence. This error is reversible per se.

The People contend any *Blakely* error in this case is subject to the prejudicial error standard of *Chapman v. California* (1967) 386 U.S. 18: "the error does not warrant relief if it is harmless beyond a reasonable doubt." Although it is arguable that some of the aggravating factors listed by the trial court in support of its imposition of the upper term were not subject to jury fact-finding under *Blakely*, many others were. Under these circumstances, we cannot conclude beyond a reasonable doubt that the trial court would have imposed the upper term after disregarding aggravating factors required by *Blakely* to be found true beyond a reasonable doubt by the jury. Carapia's sentence is vacated and the matter is remanded with instructions.

## DISPOSITION

We reverse and remand for resentencing in accordance with the views expressed in this opinion. The judgment is otherwise affirmed.

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McCONNELL, P. J.

I CONCUR:

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HALLER, J.



McDONALD, J., Concurring and Dissenting.

I concur with the majority opinion to the extent it vacates the sentence and remands the matter to the trial court for reconsideration of imposition of the upper term on count 1. I dissent from the majority opinion to the extent it finds substantial evidence to support the criminal street gang enhancement (Pen. Code, § 186.22, subd. (b)(1))<sup>1</sup> used to aggravate the sentence on count 1 and finds no abuse of discretion by not bifurcating the trial of the substantive crime allegations from the trial of the criminal street gang enhancement allegations. However, I conclude the denial of trial bifurcation was not prejudicial error.

#### FACTUAL AND PROCEDURAL BACKGROUND

On June 7, 2001, a dispute arose over a cellular telephone Richard Goodman loaned to Tony Jose Carapia. The telephone belonged to Stephen Thomas (Stephen) and his wife, Adrian. Stephen discovered Carapia was using the telephone, told Carapia there was a problem and asked Carapia to meet him at Goodman's house to return it. Joseph Carapia (Joseph), Carapia's cousin, drove Carapia to Goodman's house. Carapia returned the telephone to Goodman, and remained at Goodman's house.

On Stephen's arrival at Goodman's house, he walked through the living room into the bedroom to meet Goodman; approximately four Hispanic males, including Carapia, were sitting in the living room. Goodman asked Stephen if he "came prepared;" Stephen responded that he was "always prepared."

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise specified.

Goodman returned the telephone to Stephen, who then confronted Carapia. Carapia said, "You said we have a problem." Stephen replied the problem was resolved because he had retrieved the telephone. Carapia responded that everything in the house belonged to him. The argument continued; Carapia then lunged at Stephen several times. Stephen pushed Carapia into the wall. A physical fight followed in which Stephen was stabbed several times.<sup>2</sup> Stephen reached into his pocket to get his pocketknife, but it was lodged in the corner of his pocket. Everyone else in the room fled during the fight.

After the fight, Carapia said to Joseph, "Where the hell were you? I thought you were going to back me up. Let's get out of here." At the hospital that night Stephen told an officer Carapia stabbed him. Carapia testified no one else was between him and Stephen or behind Stephen during the altercation.

Escondido Police Detective Luis Rudisell testified as an expert on whether the charged crimes were committed for the benefit of a criminal street gang. He testified the Westside gang consists of approximately 135-150 mostly Hispanic males. He identified Carapia as a documented Westside gang member based on Carapia's self-claimed membership, his arrests in the company of other Westside members and his tattoos identifying Westside membership. Rudisell testified Carapia was an active member of the Westside gang on the night of the fight with Stephen. The prosecution also

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<sup>2</sup> Stephen did not know he was being stabbed until Carapia's last swing to his chest. Stephen was stabbed seven times, including several wounds on his left side and two wounds in his chest. Carapia testified he did not have a knife, he did not see anyone stab Stephen, and after being pushed he does not remember anything except Stephen yelling he had been stabbed.

introduced a picture of Carapia throwing gang signs at the gravesite of a former Westside member. Carapia denied being a Westside gang member.

The Westside gang's primary activities include selling methamphetamine, extortion, witness intimidation,<sup>3</sup> assault with deadly weapons, homicide, and carjacking. Gang members protect their territory through violence and intimidation and gang members who commit violent crimes gain status within the gang because they receive respect from other gang members.

Goodman's house is located in the Westside gang's territory. Goodman testified Westside members dominated it for several months before the stabbing. Graffiti on furniture at the house advertised it as a Westside hangout. There was also a succession of gang members holding leadership roles in the house. At the time of the incident, Carapia was trying to establish himself as the leader. He told Goodman, "If there [are] any drugs that are going to be sold in this house, they are going to be mine."

Rudisell believed Carapia's fight with Stephen would benefit the Westside gang because violent actions by gang members increase respect for the gang, the reputation of the gang, and the member's level of respect within the gang. He explained violent conduct promotes narcotic sales by creating a monopoly in the area. He further testified

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<sup>3</sup> There is conflicting evidence of witness intimidation in this case. Goodman testified Carapia told him he would be "taken care of" if he cooperated with the police and Adrian would be "shut up" if she did not keep quiet. Furthermore, Stephen testified Carapia threatened him into copying a statement denying Carapia stabbed him. Although Carapia admits it was his idea to write the statement, he testified he did not tell Stephen what to write or threaten Adrian's safety. He also testified Stephen wrote the letter of his own will because he was surprised Carapia was still locked up.

the situation in this case would be consistent with an intent to promote the gang's reputation.

## DISCUSSION

### I

#### *Evidence to Support the Gang Enhancement*

The evidence is insufficient to support the criminal street gang enhancement because there was no showing the crime was committed for the benefit of a criminal street gang with the specific intent to promote gang-related conduct.

The majority opinion correctly states that "[t]o establish a criminal street gang enhancement, the prosecution must prove the underlying crimes were 'committed for the benefit of, at the direction of, or in association with any criminal street gang, with the *specific intent* to promote, further, or assist in any criminal conduct by gang members. . . .' (§ 186.22, subd. (b)(1), italics added.) A finding of specific intent requires a subjective desire to benefit the gang in committing the offense. (See 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Elements, § 5, p. 204; see also *State v. Varszegi* (1993) 33 Conn.App. 368, 372 [635 A.2d 816, 818].)" (Maj. opn., *ante*, at p. 7.)

Here, the evidence is insufficient to support the jury's finding Carapia committed the crimes for the benefit of a criminal street gang with the specific intent to further gang criminal conduct. There is clear evidence Carapia belongs to the Westside gang. He is a self-claimed Westside gang member, has Westside gang tattoos and has been arrested in connection with and in the company of other Westside members. However, mere gang membership does not support a sentence enhancement under section 186.22, subdivision

(b)(1); rather, increased criminal penalties are imposed when the criminal conduct is committed for the benefit of a criminal street gang, with the specific intent to promote any criminal conduct by gang members. (*People v. Gardeley* (1996) 14 Cal.4th 605, 623-624.) Rudisell's testimony the stabbing could benefit the gang because word of the violent fight would spread to other Westside members and rival gangs does not establish Carapia's offense was committed with the specific intent to promote criminal conduct by gang members. There is no evidence in the record the stabbing of Stephen promoted or was intended to promote further criminal conduct by gang members.

To the extent the fight was over a cellular telephone between a gang member and a non-gang member, it was not for the benefit of the gang. When Stephen arrived at Goodman's house, he retrieved the telephone and then Carapia confronted him about their "problem," referring to the earlier telephone conversation between them. When Stephen responded, the two engaged in a verbal argument, which escalated into a physical fight. Even though Carapia is a documented Westside member, other Westside members were present in Goodman's house, and the fight took place in a Westside hangout, there is no evidence Carapia claimed gang membership on the evening of the fight. Carapia did not throw gang signs, mention the gang's name or use any gang name at any time before, during or after the fight. The attack did not involve drugs, gang territory or other Westside or rival gang members. Even were the stabbing for the benefit of the gang, rather than the result of an aggravated personal dispute, there is no evidence the stabbing resulted from Carapia's specific intent to benefit the gang or to promote criminal conduct by gang members.

The jury could not reasonably infer from the gang affiliation evidence and the circumstances surrounding the stabbing that Carapia committed the offense for the benefit of the gang with the specific intent to promote, further, or assist criminal gang conduct. The majority opinion infers presence of the requirement of Carapia's specific intent expressly required to find true the gang enhancement allegation under section 186.22, subdivision (b)(1), and states the jury could reasonably conclude the offense was committed with that specific intent. However, it is difficult to imagine a crime committed by a gang member that, under the majority opinion's analysis, would not be committed with the specific intent to benefit the gang. The majority opinion in effect holds the section 186.22, subdivision (b)(1) gang enhancement applies to all crimes committed by gang members and thereby converts a sentence enhancement into the basic penalty for the underlying offense.

## II

### *The Motion To Bifurcate*

The trial court abused its discretion by denying the motion to bifurcate trial of the criminal street gang enhancement from trial of the substantive offenses. In denying the motion to bifurcate, the trial court stated evidence of gang membership would be admitted because (1) the stabbing occurred at a house taken over by gang members, and (2) any prejudice arising from a unitary trial was substantially outweighed by its probative value given the other allegations. Carapia presented several reasons in support of bifurcation, including irrelevancy of the evidence to the underlying offenses, the harm to his case because of inconsistent factual evidence, and the highly prejudicial effect the

gang evidence would have on the jury's determination of the inconsistent factual evidence.

In *People v. Hernandez* (2004) 33 Cal.4th 1040, the California Supreme Court held a trial court did not abuse its discretion in refusing to bifurcate trial of a gang enhancement allegation. In *Hernandez*, the defendants robbed a woman sitting in a car. While committing the crime, Hernandez told her she was dealing with "Hawthorne Little Watts." (*Id.* at p. 1045.) A gang expert testified gang members reveal the name of their gang during the commission of crimes to gain respect for the crimes committed and to instill fear in the community. (*Id.* at p. 1046.) The Supreme Court determined the gang evidence was relevant to the charged offense because Hernandez identified himself as a gang member and this was relevant to motive and fear. (*Id.* at pp. 1049-1050.)

In *People v. Martin* (1994) 23 Cal.App.4th 76, the defendant shot at people he believed to be rival gang members. The court suggested criminal street gang enhancement allegations need not be bifurcated because it must be proven the defendant had the specific intent to promote, further or assist a criminal street gang at the time of the substantive offense. (*Id.* at pp. 81-82.) The court noted there was no reasonable way to bifurcate the gang enhancement evidence because that evidence was inextricably intertwined with the evidence of the underlying crime; the same witnesses testified on the substantive charges and the gang enhancement. (*Id.* at pp. 80-81.)

Here, however, there was insufficient evidence to support the gang enhancement allegation because the evidence did not show Carapia had the specific intent to promote

gang activity in committing these crimes. Thus, the criminal street gang enhancement evidence was irrelevant to the underlying crimes and should have been excluded.

Even assuming sufficient evidence supports the gang enhancement allegations, it was error not to bifurcate trial of the gang enhancement allegation. Unlike *Hernandez*, Carapia did not mention his moniker or the Westside gang's name, and the crime was not committed in conjunction with another gang member. Furthermore, the Supreme Court in *Hernandez* suggested it was not mandatory to have a unitary trial on the gang enhancement allegations. (*People v. Hernandez, supra*, 33 Cal.4th at pp. 1045, 1049-1050.) Where the gang evidence is of so little relevance to guilt, the gang enhancement allegation may be bifurcated if it threatens the jury's determination on the substantive offense. (*Id.* at pp. 1049-1050.) Here, the gang evidence was not relevant to identity, motive or intent, and a bifurcated trial would have been appropriate.

Unlike *Martin*, the evidence for the crime and the gang enhancement was not inextricably intertwined. The only witnesses that testified on the fight in this case were Stephen and Carapia; no one else saw the fight. Rudisell testified on the Westside gang in general and on Carapia specifically. He based his opinion on conversations he had with Westside members and on investigations of crimes committed by Westside members. Other witnesses testified on the circumstances leading up the fight, or were used for impeachment purposes. Goodman was the only witness who testified on both the gang and the circumstances surrounding the fight. However, his gang-related testimony was limited and focused on the succession of leaders at his house. The gang evidence admitted into trial was not inextricably intertwined with the underlying crime or



tangentially relevant to the charges. Furthermore, the gang evidence was not probative of Carapia's identity, motive or intent. The potentially prejudicial evidence relevant to the enhancement was irrelevant to the charge and not bifurcating the gang affiliation evidence was an abuse of discretion.

Where error is found in the admission of evidence following a discretionary decision under Evidence Code section 352,<sup>4</sup> the issue is whether the defendant suffered prejudice by admission of that evidence. The erroneous admission of evidence warrants reversal only if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 325.) A reasonable probability "does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*. [Citations.]" (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.)

Although the trial court abused its discretion by not bifurcating trial of the gang enhancement from the trial on the underlying crimes, the error was not prejudicial. There is evidence Carapia stabbed Stephen several times with a knife, causing great bodily injury. Carapia waited at Goodman's house in anticipation of a fight with Stephen. Instead of leaving the house after delivering the telephone, or ignoring Stephen as he left Goodman's house, he confronted Stephen and initiated an argument with him. He

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<sup>4</sup> The court may exclude evidence if its probative value is substantially outweighed by the probability its admission will create substantial danger of undue prejudice. (Evid. Code, § 352.)

proceeded to lunge at Stephen several times in an effort to get Stephen to fight. Stephen suffered two stab wounds to his chest and Carapia was the only person standing in front of Stephen; no one stood behind Stephen.

The trial court's error relating to Carapia's gang affiliation was harmless because it is not reasonably probable Carapia would have received a more favorable result had the gang evidence been excluded.

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McDONALD, J.